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DEC 14

Supreme Court of the United States

No. 45. October Term, 1939.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York,
Petitioner,

against

FELT & TARRANT MANUFACTURING CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER

December 12, 1939.

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

WILLIAM C. CHANLER,
EDMUND B. HENNEFELD,
JEROME R. HELLERSTEIN,
of Counsel.

452 Appeal Printing Co., Inc., 130 Cedar St., New York - WOrth 2-8242

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PETITIONER

A writ of certiorari was granted by this Court on June 5, 1939, to review a final order of the Court of Appeals, affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, which nullified the petitioner's determination that certain sales taxes were due and owing to him as Comptroller of the City of New York. The amount of the tax in controversy is $2,973.98, with interest, and the period embraced is December 10, 1934 to December 31, 1935 (R. 77-78).

The sole ground for the nullification of the petitioner's determination by the order under review was that the New York City sales tax law, as here applied, violated the Commerce Clause, Article I, Section 8, Clause 3, of the Federal Constitution (R. 92).

Opinions Below

The opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 78), before which the proceedings to review the Comptroller's determination were heard in the first instance (New York Civil Practice Act, Art. 78), is reported in 254 N. Y. App. Div. 246 (1938).

The Court of Appeals wrote no opinion but said (R. 90):

> "Order affirmed, with costs, upon the authority of *Matter of National Cash Register Co.* v. *Taylor* (276 N. Y. 208).* No opinion."

This memorandum of decision is reported in 279 N. Y. 678, 18 N. E. (2d) 311 (1939). The supplemental memorandum on motion for reargument or amendment of remittitur, wherein the Court of Appeals added to the foregoing memorandum the words (R. 92),

> "and upon the sole ground that the City Sales Tax Law as here applied violates the commerce clause (Article I, Section 8, Clause 3) of the Constitution of the United States."

is reported in 280 N. Y. 689, 21 N. E. (2d) 198 (1939).

Jurisdiction

The writ of certiorari was issued pursuant to the power conferred on this Court by U. S. Code, title 28, §344, subsec. b. The decision below having sustained the claimed federal right, and the federal question being the sole ground of decision (R. 92), a case was made out within the cited statute for this Court to issue the writ.

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* Certiorari denied, 303 U. S. 656 (1938).

Specification of Errors to Be Urged

We respectfully submit that the Court of Appeals, in deciding the case in the manner indicated above, erred:

(a) In holding that the New York City sales tax as applied to the respondent's sales constituted an unconstitutional burden on interstate commerce.

(b) In holding that the sales which were the subject of the tax were contracts for interstate shipments, or otherwise required or necessarily involved interstate commerce, giving in so holding an erroneous interpretation of the case of *Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 (1935).

(c) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division, and annul petitioner's determination of tax liability.

Statement of the Case

This case, involving as respondent the Felt & Tarrant Mfg. Co., does not differ in any material respect from *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939). Not only does it involve the same taxpayer and the identical business methods, but the tax imposed is substantially the same in every material respect.

The respondent is an Illinois corporation engaged in manufacturing and selling comptometers and delivering them to purchasers in various States of the Union (R. 25, 31-32). Together with the Comptometer Company, its wholly owned subsidiary and agent (R. 52), it maintains in New York City offices, workrooms and stockrooms. There, it sells, rents, repairs and services comptometers and parts of comptometers. Its New York City selling staff consists of a general agent and numerous sub-agents

(R. 33). Only those New York City sales are in issue which are filled (*via* the New York City stockroom) from machines on hand in the Illinois factory (R. 25).

The respondent's products, comptometers, are standard machines of standard sizes, not specially built or manufactured to fill a particular order (R. 45, 59). They are of only two general types, hand-driven and electrically operated (R. 32, 45).

The respondent always has on hand in its New York City stockrooms between 250 and 300 comptometers (R. 32, 45), which, at an average value of $350 each (R. 53, 59), represent an inventory value of between $80,000 and $100,000. Despite these storage facilities, the respondent chooses not to fill its New York City orders from its New York stock, but adheres, instead, to the following procedure:

Orders taken by the New York City agents or subagents are sent by them to Chicago (R. 27). At respondent's insistence, the orders are required to be addressed to the Chicago office (R. 37). For reasons best understood by respondent, if the order comes addressed to the respondent at 299 Broadway, New York City, it is sent back to the customer with instructions to change it to show the Chicago address (R. 37).

The order specifies the quality, style, size, and price of the machine purchased (R. 53). It does not indicate where the machine is to come from (R. 53), nor is there any evidence that the customer has any knowledge where the machine will come from (R. 53). Since the respondent bears the shipping costs and risk of loss (R. 49), the customer actually purchases the machine "delivered".

All orders taken are subject to confirmation by respondent in Chicago (R. 28, 53). However, the procedure as

to confirmation appears to be largely ceremonial. Prices are fixed, not in Chicago but by the solicitors in New York, on the basis of a standard price list (R. 38, 57). The trade-in-value of old machines is fixed in New York (R. 56-57). There is no evidence that the Chicago office ever fails to confirm, nor is there any evidence that the customer is ever notified of confirmation. As a matter of fact, the order forms contain no space for confirmation (R. 53). The requirement of Chicago confirmation apparently serves no purpose other than to check inaccuracies in price quoting and to allow for additional credit checking (R. 38).

The respondent packs the machine in a carton and ships it, not to the customer, but to its New York City office (R. 39). The customer is not concerned at all with this shipment, is not the consignee, is not covered by the insurance, and, of course, does not pay the freight (R. 39, 49). The respondent must ship the comptometer to its New York workroom because the machine on its arrival in New York is frequently not in a deliverable state (R. 39). There is a "great deal of breakage" in transit which must be repaired in the New York workroom (R. 39). Even where there has been no breakage, testing, overhauling and adjusting must be done there (R. 39, 45). These activities of repair and adjusting often take three or four days, and it is not until they are completed that the New York office can make delivery to the customer (R. 47).

The respondent's obligations do not cease with delivery. Each contract of sale requires it, as an essential part thereof,

> "to keep the above Comptometer while in possession of (name of customer) in complete repair for

one year from date free of all charge for repairs" (R. 53).

In this connection, the respondent renders a free monthly service of "inspection, oiling, cleaning" (R. 34). When repairs or instalments of new parts are required, the work is done in New York (R. 44). While the machines are being repaired, repair loans are made of other machines from the New York stock (R. 47). During the first half of the tax period in question, respondent carried on this work of servicing and repairing directly, employing a staff of technicians for that purpose. In the second half, respondent organized a wholly-owned subsidiary, the Comptometer Company, to do the work (R. 34-35, 60, 51, 68).

Although respondent concedes that it makes a considerable number of local rentals and sales of parts which are taxable (R. 14A, 14B, 78), it has never qualified to do business in New York (R. 3-4, 31, 60). In June, 1935, its subsidiary, the Comptometer Company, received such authority (R. 60). But, both before and after the formation of the Comptometer Company, respondent engaged in concededly taxable local transactions (R. 68).

The Court of Appeals, by its amendment of the remittitur (R. 92) has indicated clearly that the tax assessment here involved is in entire conformity both with the New York City local law pursuant to which it was imposed (Local Law No. 20 of 1934, as amended), and the State enabling act pursuant to which the local law was enacted (New York Laws of 1934, ch. 873).

The New York City Sales Tax Law

This tax was first enacted on December 10, 1934, as part of a comprehensive program of tax measures* by which New York City was to finance its pressing emergency relief needs on a pay-as-you-go basis. It was enacted pursuant to emergency enabling legislation passed by the State legislature (Laws of 1933, ch. 815, effective Aug. 29, 1933, and amendments and renewals thereof). The enabling act declared that an emergency existed requiring the imposition of taxes "to relieve the people * * * from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare." It authorized the City of New York to "adopt and amend local laws imposing in any such city any tax which the legislature has or would have power and authority to impose." The revenues from the taxes were required to be used exclusively for emergency unemployment relief.

The tax imposed by the Local Law No. 20 of 1934, as amended, is limited to purchases for consumption. Purchases for resale are exempt under a definition of retail sale having that express purpose (§1g). A purchaser who has paid the tax and later resold may, upon filing a proper certificate of resale, obtain a refund of the taxes paid (§14).**

The sales tax applies with respect to the following kinds of purchaser-consumers (§2a, b, c and d):

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* Certain of these measures were before this Court in *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938), where they were sustained as against asserted contravention of the Fourteenth Amendment.

** Under the New York City emergency relief business tax law, on the other hand, wholesale as well as retail vendors are taxed. Local Law No. 9 of 1934 and its successors.

1) Consumers of goods,* excluding food and drugs on prescription.

2) Consumers of utility services,** *i. e.*, gas, electricity, telephone, etc.

3) Customers in restaurants and cafes where the meals are over $1.***

The tax is imposed not on the seller† but on the buyer. The statute makes this abundantly clear and the Courts have so held. *Matter of Merchants Refrigerating Co.* v. *Taylor*, 275 N. Y. 113, 124 (1937); *Matter of Kesbec, Inc.* v. *McGoldrick*, 278 N. Y. 293, 297 (1938).

The statute provides that the tax is payable "by the purchaser to the vendor, for and on account of the city of New York" (§2). The vendor is liable for collection, filing of returns and payment over to the City and has "the same right in respect to collecting the tax from the purchaser, or in respect to non-payment of the tax by the purchaser, as if the tax were a part of the purchase price of the property or service" (§2). The vendor is required to state and charge the tax separately from the sales price (§2). Failure to do so or failure to collect the tax as such renders the vendor subject to criminal penalties. It is also a crime for the vendor to advertise that he is absorbing the tax (§§2, 15). Where the vendor fails to collect the tax, the purchaser-consumer is required within fifteen days

* The *vendors* of goods, on the other hand, are taxed under the New York City emergency relief business tax law. Local Law No. 9 of 1934, and its successors.

** The *vendors* of utility services are taxed under the New York City emergency relief utility tax law. Local Law No. 19 of 1933, and its successors.

*** The *restaurateurs* were liable for a business tax.

† No license is required of the seller, or of anyone else for that matter, as a condition of making the sale.

to file a return and pay the tax directly to the Comptroller, and the Comptroller is authorized to proceed directly against the purchaser for payment of the tax (§2).

Argument

POINT I

A State tax is void under the commerce clause only if in some way it interferes with the power of Congress "to regulate Commerce * * * among the several States." That is a question of fact.

The taxpayer claims that this tax violates the provision of the Constitution conferring upon Congress the power "to regulate Commerce * * * among the several States * * *." As this clause does not in terms limit the taxing power of the States, it is obvious that this can be so only if, as a matter of fact, the tax violates its purposes and intent.

The purpose of this clause was largely to prevent the States from favoring domestic industry as against the industries of other States, either by erecting tariff barriers or by other forms of regulation or taxation, and thus stifling the growth of a national economy based upon the principle of free trade among the States (*Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 523 [1935]). The evils of local tariff barriers were very much in the minds of the framers of the Constitution; for they were fully aware of the many examples of those evils presented not only by the acts of the various States under the Articles of Confederation, but by contemporary Europe, and were determined to prevent their continuance in this country.

The wisdom of their decision has been overwhelmingly demonstrated by its results.

At the same time, it was not the purpose of that section to interfere with the right of States, subject to this limitation, to impose taxes to meet their own needs. As Alexander Hamilton said in the Federalist No. XXXII:

> "I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm that (*with the sole exception of duties on imports and exports*) they would, under the plan of the convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause of its Constitution." (Italics ours.)

It is our contention that these principles form the basis of all the decisions of this Court dealing with State taxes under the Commerce Clause. As we shall point out hereafter, the Court has invariably upheld a State taxing statute unless it found either that the tax interfered in some manner with the free flow of interstate commerce, by subjecting it to a greater burden than would result if interstate commerce were not involved, or that it interfered in some way with the exclusive right of Congress to regulate that commerce. The Commerce Clause does not entitle interstate merchants to a "free ride" at the expense of their local competitors; nor does it permit them to carry on their business without paying any part of the expense of the local governments that protect the various phases of their activities.

A very recent expression of this principle is to be found in the case of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), at p. 258, where the Court said:

> "But we think the tax assailed here finds support in reason, and in the practical needs of a taxing system which, under constitutional limitations, must accommodate itself to the double demand that interstate business shall pay its way, and that at the same time it shall not be burdened with cumulative exactions which are not similarly laid on local business."

It is evident from a mere statement of this proposition that its application must be based upon factual rather than legal considerations. The Commerce Clause does not in terms limit the taxing power of States. It is only because the Court has found that in certain instances certain statutes as a matter of fact interfered with the right of Congress to regulate commerce that such taxing statutes have been invalidated.

It follows that each statute must be judged upon its own facts. To seek to determine whether or not one taxing statute constitutes an unconstitutional regulation of or interference with interstate commerce by citing formulae alleged to have been laid down by the Court in passing upon another, which may have presented an entirely different state of facts, will inevitably lead to wholly improper and unjustified results. And so this Court has consistently held.

> "No formula has yet been devised by which it can be determined in all cases whether or not such a tax [affecting interstate commerce] is valid, and, applying the repeated declaration of this court, in the cases cited and in many others, * * * the

question is inherently a practical one, depending for its decision on the special facts of each case * * *"

Hump Hairpin Co. v. *Emmerson*, 258 U. S. 290, 295 (1922).

"Discrimination like interstate commerce itself, is a practical conception. We must deal in this matter, as in others, with substantial distinctions and real injuries."

Gregg Dyeing Co. v. *Query*, 286 U. S. 472, 481 (1932).

"Practical rather than logical distinctions must be sought."

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250, 259 (1938).

The Constitutional principle is comparable with that presented by the inter-governmental instrumentalities tax cases. There again, the taxes are not expressly prohibited by the Constitution. Their validity or invalidity depends solely upon an analysis of the facts. Is the tax in fact an interference by one government with the lawful governmental activities of the other?

"* * * the only possible basis for implying a constitutional immunity from state income tax of the salary of an employee of the national government or of a governmental agency is that the economic burden of the tax is in some way passed on *so as to impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions.*" (Italics ours.) *Graves* v. *New York ex rel. O'Keefe*, U. S. , 83 L. Ed. 577 (1939).

So here the only possible basis for implying a constitutional immunity from State tax is that the burden of the tax in some way imposes a burden on interstate commerce tantamount to an interference by the State with that commerce. That is a question of fact.

POINT II

This Court has recently sustained a State tax in a case involving this very respondent, under circumstances identical in every respect with those here presented.

As we have seen, the sole question in this case is whether upon a factual analysis it can be found that the tax in question interferes with the power reserved to Congress to regulate interstate commerce.

In the briefs submitted by us in the companion cases of *McGoldrick* v. *Compagnie Generale Transatlantique*, *McGoldrick* v. *Berwind-White Coal Mining Co.*, and *A. H. DuGrenier Inc.* v. *McGoldrick*, to be argued herewith, we discuss at length the general principles laid down by this Court in dealing with this subject. As will more fully appear from that discussion, this Court has never invalidated a State taxing statute unless it was found that as a matter of fact it subjected interstate commerce to a greater burden, or to the danger of a greater burden, than would arise if the commerce were not being done. As we further point out in those cases, the tax at bar is valid because it does not subject interstate commerce to such a burden, or to the possibility of such a burden. Copies of these briefs will be furnished to counsel in this case. Suffice it for the present to point out that this Court has

very recently sustained a tax identical with the tax at bar in every factual respect, in a case involving this very respondent, and this very method of selling and delivering goods across State lines. *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62 (1939).

The facts in the California case are set forth in the opinion of this Court (306 U. S., at pp. 64-66) in the following language:

> "It appears—
>
> Appellant, an Illinois corporation, is engaged in manufacturing and selling comptometers in that state and delivering these to purchasers in various parts of the Union. As stated by the court below its method of doing business with respect to California purchasers is substantially as follows:
>
> 'Pursuant to a separate contract made with each, the exclusive right to solicit orders in California is granted to two general agents, each of whom is allotted a separate section of the State. Under this contract the only compensation paid to a general agent consists of commissions on sales made. Each general agent may employ subagents and also a demonstrator for the purpose of demonstrating and instructing respecting the comptometers, provided such employment is approved by plaintiff. Likewise, plaintiff agrees by this contract to pay the rent of an office for each general agent, provided the lease to the same has been approved by it, such office to be used exclusively in furthering its business; also agrees to pay part of the traveling expenses incurred by each general agent, his subagents and demonstrators while traveling on business trips authorized by plaintiff, and also to reimburse each general agent to the extent of part of the monies advanced to a subagent and, in addition, in the amount of $40.00 per

month toward the salary of a demonstrator. Plaintiff assumes no other financial obligation with respect to subagents and demonstrators. Under this contract the general agent must devote his entire time and attention to soliciting orders for plaintiff. All orders taken must be submitted to and approved by plaintiff, all sales and deliveries must be made by, and all bills for such orders as are accepted must be rendered by, the plaintiff. The general agent is prohibited from making collections and all payments must be made directly to plaintiff. The contract further requires the general agent to maintain certain records, and make certain reports and make a specified minimum number of calls on prospective customers.'

And further 'That each of these two general agents maintains an office in this state, the lease to such office designating the plaintiff as lessee therein, the rent for the same being paid by plaintiff, while all other expenses of maintaining such office are paid by the general agent. As soon as an order is accepted a particular machine is appropriated for that purpose in plaintiff's shipping department in Illinois. All machines sold for delivery in California are shipped from one of plaintiff's distributing points outside of the state. Sometimes machines are forwarded directly to the purchasers, while in other instances, in order to secure reduced freight charges, large groups of machines are shipped to the general agent who makes delivery to the respective purchasers. The only machines kept by plaintiff in California are those used as demonstrators. Plaintiff has never qualified to do intrastate business in California'."

That this statement of facts is applicable in every detail to the facts at bar is evident from the statement of facts at pages 3 to 6, *supra*. It is further apparent in

greater detail by reference to the following pages of the record in this case: 25, 28, 31, 32, 33, 39, 53, 54, 56, 57, 58, 60. If any further evidence were required as to the factual similarity between the two cases, we respectfully refer the Court to the taxpayer's own statement of facts as contained in its petition at bar (R., pp. 3, 5-6).

So much for the identity of business procedure. The following tabular comparison will show the factual identity of the two taxes.

California Tax	New York City Tax
1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.	1. The tax is imposed on the purchaser at retail of merchandise purchased for consumption and not for resale.
2. The tax is a given percentage of the sales price.	2. The tax is a given percentage of the sales price.
3. The tax is paid by the purchaser at the time of the sale.	3. The tax is paid by the purchaser at the time of the sale.
4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.	4. The vendor is directed to collect the tax and to state and charge it separately, and is forbidden to absorb the tax, all under pain of criminal penalties.
5. The tax is collected by the vendor, who files the returns.	5. The tax is collected by the vendor, who files the returns.
6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.	6. If the tax is not collected by the vendor, it is payable directly by the purchaser to the taxing official.
7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.	7. The tax law requires the vendor to insure payment of the tax if he fails to make the collections from the taxpayer.

Thus, factually, the two taxes are identical. How, then, can one interfere with interstate commerce, while the other does not?

Our adversaries will no doubt argue that one is called a "use" tax and the other, a "sales" tax; that the taxable event in one is described as "the exercise of any right or power * * * incident to the ownership of the property" other than resale (Cal. Laws of 1935, ch. 361, as amended by Laws of 1937, chs. 401, 671 and 683), whereas in the other the taxable event is the "transfer of title or possession or both" for any purpose other than resale.

But this is a difference in words, not a difference in substance. As was recently stated by this Court in *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939), at p. 177:

> "State taxes upon national commerce or its incidents do not depend for their validity *upon a choice of words* but upon the choice of the thing taxed." (Italics ours.)

A comparison of the respective statutory definitions of "use" and "sale" makes it evident that "the thing taxed" is in substance identical: the California levy, like the tax at bar, is in fact imposed upon purchases for consumption.

The California law defines "use" as follows:

> "'Use' means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property" except sales of property in the regular course of business. (Sec. 2[b]).

The New York City definition of "sale" in so far as relevant to the cases at bar is as follows:

> "The word 'sale' * * * means any transfer of title or possession or both * * * for a consideration" (sec. 1[e]).

In *Southern Pacific Co.* v. *Gallagher, supra,* the Court has upheld the California tax as applied to the sale and delivery of goods to the purchaser across State lines, even though the goods were consumed in interstate commerce immediately after their receipt by the purchaser. In short, the tax was imposed upon the transfer of the property to the railroad company in California. The New York City sales tax is imposed upon precisely the same activity—the transfer of the comptometer to the customer in New York City.

It is apparent that both the California and the New York taxes are upon the consumer based upon his acquisition of property for consumption. The New York tax is as much a "use" tax as the California tax, and the California tax is as much a "sales" tax as the New York tax. Both are taxes on the consumer; both require collection by the vendor, and both are otherwise identical in substance and procedure.

It is clear that *this* taxpayer could be compelled to pay *this* tax upon *these very transactions*, had these transactions taken place in California under the California use tax statute. How can the imposition of that tax violate the Commerce Clause, when imposed in New York City under the New York City sales tax?

It is true that if the New York tax is held void, interstate commerce will flow more freely in New York than in California, for obviously every New York purchaser will seek to buy his goods only from those vendors who are able to store their goods in another State and make shipment across State lines. If it be the purpose of the

Commerce Clause to subsidize interstate commerce to the point of destroying local business, then indeed this tax should be held invalid. But certain it is that if it be sustained, interstate commerce will be no worse off in New York than it is in California. No New Yorker will favor interstate shipments less because the tax is called a "sales" tax, and is described in a statute which he has never seen as being imposed upon his acquisition of the property for consumption, than he would if the tax were described as a "use" tax and imposed upon his receipt and retention of the property for consumption.

It takes more than dialectics to change the course of interstate commerce.*

POINT III

Upon the facts, this case is indistinguishable from the recent case of *Graybar Electric Co.* v. *Curry*.

The case of *Graybar Electric Co.* v. *Curry*, 308 U. S. , Dec. 4, 1939, arose under the Alabama sales tax, a mandatory consumer's sales tax of precisely the same nature as the New York City tax (189 So. 186).

Like the respondent, the taxpayer in that case was a foreign corporation, with its principal place of business outside the taxing State. Like the respondent, it main-

* We may mention in passing, recognizing its limited pertinence, that the respondent's objection to the tax is narrower than the claim that the City sales tax may not be imposed here at all. The respondent apparently acknowledges the right of the Comptroller to collect the sales tax from its customers as purchasers, and contends only that the Comptroller has no right to require the respondent to collect the tax as vendor (Respdt's Br. in Opp. to Cert., pp. 9-10). Of course, the decisions of this Court dispose completely of this contention. *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra.*

tained a divisional office in the taxing State for the solicitation of local sales. Like the respondent, it carried a small quantity of standard goods in stock, filling its orders chiefly by shipment from out of the State. Also like the respondent, it objected to the imposition on it of the duty to collect the tax from its local customers on sales filled by such shipments.

The interstate shipments in the *Graybar* case fell into four classifications, denominated in the State Court's opinion as Classes A to D.

Class C presents a situation identical with that at bar. In this category are the shipments by the taxpayer from its own out-of-State warehouses of goods not carried in stock in the taxing State.

Class A presents a situation even stronger for the taxpayer than that at bar. Under this heading are all sales in which the taxpayer was required by contract to deliver goods "manufactured at the plant of the General Electric Company located in the State of Ohio and shipped in interstate movement from said plant" to Alabama. Some of the goods had to be built to the customer's specifications at the Ohio plant. Most of them were for goods not carried in stock within the taxing State.

While perhaps no one of the four methods of doing business passed upon by the Court in that case is in every essential identical with that at bar, as a group they present every factual situation here involved. We think the cases are substantially identical from that factual standpoint.

Even if it be thought that the case at bar can be distinguished from the use tax cases, it must in any event be sustained on the authority of the *Graybar* case: The

burden is the same; the incidence is the same; the method of collection is the same; and the taxable event is the same. If one does not infringe upon the Commerce Clause, the other cannot. We think that in each case "The act lays no burden on interstate commerce as such, and if any can be said to result from the imposition, *it is indirect and precisely as that which would have resulted if deliveries had been made exclusively by intrastate transportation* • • •" (*Wiloil Corporation* v. *Pennsylvania*, 294 U. S. 169 [1935]).

Conclusion

The entire tax situation at bar is so similar to that involved in *Felt & Tarrant Mfg. Co.* v. *Gallagher, supra*, that unless the mere name of the tax is to be regarded as controlling, the tax at bar should be upheld. "To hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance." (*Pearson* v. *McGraw*, 308 U. S. [December 4, 1939].) But even if this tax were different, we respectfully submit that, like the tax in the *Graybar* case, it must be sustained, because upon a factual analysis it is clear that it does not subject interstate commerce to a greater burden, or to the danger of a greater burden, than would result if the goods were delivered from a point within the State.

The final order and judgment should be reversed and petitioner's determination confirmed.

December 12, 1939.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Counsel for Petitioner.

WILLIAM C. CHANLER,
EDMUND B. HENNEFELD,
JEROME R. HELLERSTEIN,
of Counsel.